may determine it is in its best interests to return some licenses to the Commission, retain some of its licenses and attempt to acquire other licenses near the ones it retains. By allowing licensees to make individual decisions of this nature, we believe that we will be meeting our obligation to facilitate provision of communications services to the public.

49. A large number of commenters raise the issue of parity, and claim that since licensees in the 218-219 MHz Service paid a twenty percent down payment rather than the ten percent down payment required of C block licensees, the Commission should return ten percent of the amount paid.[168] One licensee proposes surrender and a flat $2500 payment with no additional penalties. We will not return any portion of the down payment to eligible licensees electing the amnesty option, irrespective of the percentage difference between C block and IVDS down payments. We believe that permitting licensees to return spectrum and avoid the risk of future default with no further financial liability is a significant benefit. Moreover, we believe that refunding down payments would undermine the integrity of the auctions process by relieving participants of even the most basic obligation of their participation.[169] Such an approach would not only be unfair to the other participants, but would encourage speculation in future auctions.

50. Many licensees paid the installment payments due prior to March 16, 1998, after which installment payments effectively were suspended by the *218-219 MHz Flex Order*. We believe that due to the actions we take in this *Report and Order*, it would be unjust and inequitable to treat installment payments the same as we do down payments, especially because the most fiscally responsible licensees made installment payments while others did not. Consequently, where an Eligible Licensee has elected amnesty for some of its licenses and resumption for others, we direct the Office of the Managing Director to apply all installment payments associated with the returned spectrum to accrued interest on the retained licenses. Any excess funds should be applied to reduce the principal owed on retained licenses. Where a licensee elects amnesty for all of its licenses, we direct the Office of the Managing Director to refund the installment payments to the licensee, in accordance with procedures to be established by the Bureau and the Office of Managing Director on delegated authority. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.[170]

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[168] *See* Hispania Reply Comments at 5; Interactive Comments at 5; and Hughes Comments at 3. Hispania's Reply Comments refer incorrectly to 10 percent as the level of down payment made by successful bidders in the 1994 auctions.

[169] *Cf.*, Mountain Solutions LTD, Inc., *Order*, 12 FCC Rcd 5904 (1997) (*review denied*), *Memorandum Opinion and Order*, 13 FCC Rcd 21983 (1998); Carolina PCS I Limited Partnership, *Memorandum Opinion and Order*, 12 FCC Rcd 22938 (1997); C.H. PCS, Inc., *Order*, 11 FCC Rcd 9343 (1996); BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), *petition for reconsideration granted in part and denied in part, Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997). *See also*, National Telecom PCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 10163 (1997) (*review pending*).

[170] Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. *See* 4 C.F.R. Parts 101-105.

4. Prepayment

51. *Background.* The *C Block Restructuring Orders* provided for this option and at least two commenters request a similar option.[171] Under the prepayment option in the *C Block Restructuring Orders*, any licensee was entitled to prepay the outstanding principal debt obligations for any licenses it elected to retain, subject to various restrictions.[172] The remaining licenses were required to be surrendered to the Commission for a future auction.[173] In exchange, the Commission forgave the debt on the surrendered licenses, and any associated payments owed. A licensee electing this option made its prepayment by using seventy percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses, plus any "new money" it was able to raise. The remaining portion of the down payment applicable to the surrendered licenses was not refunded or credited but retained by the Federal Government. Licensees were prohibited from bidding on their returned spectrum at auction or from reacquiring it in the secondary market for two years from the start of the next auction of C block spectrum. Licensees could, however, bid on spectrum surrendered by other licensees, provided such licensees were not affiliates.

52. *Discussion.* In-Sync specifically requests that we adopt a similar prepayment option.[174] Its proposal would allow first for the ten-year reamortization, then permit licensees the opportunity to choose whether to continue to pay in quarterly installments or pay the outstanding principal in a lump sum, subject to a 25 to 35 percent bidding credit. In-Sync notes that this approach would reduce many of the administrative burdens associated with installment payments, such as collecting payments, processing grace period requests, procuring documentation from licensees, and coordinating with other federal agencies.[175] We find that In-Sync's reasoning here is sound, and the prepayment option would be a logical extension of the *218-219 MHz NPRM* proposals. Prepayment may make it easier for licensees to raise the additional capital necessary to build-out their systems and deploy new services by providing licensees with a means of eliminating debt. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender. In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.

53. Although we will not adopt the precise prepayment option adopted in the *C Block Restructuring Orders*, we will provide similar relief here. Eligible licensees may retain or return as

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[171] In-Sync Comments at 7. *See also* 219-219 Group Comments at 9.

[172] *C Block First Reconsideration Order*, 13 FCC Rcd at 8360.

[173] *Id.*

[174] In-Sync Comments at 7.

[175] *Id.*

many licenses as they desire; however, licensees electing the prepayment option must prepay the outstanding principal balance for any license they wish to retain. Licensees will receive a prepayment credit equal to 100 percent of their installment payments and eighty-five percent of their down payments associated with the returned spectrum as credit on their retained spectrum. The uncredited portion of the down payment, fifteen percent of a twenty percent down payment, equals three percent of the purchase price. This percentage is equivalent to the three percent default penalty.[176] If the prepayment credit does not equal the outstanding principal amount, the licensee must submit additional funds on or before the Resumption Date in order to retain the license, subject to the Commission's full payment rules.[177] This option applies to all of the licenses a licensee holds and cannot be combined with the amnesty or resumption options.

5. Election Procedures

54. We conclude that Eligible Licensees electing one of the three restructuring options described in this *Report and Order* must file a written notice ("Election Notice") of such election with the Bureau on or before the Election Date [178] as specified in this section. Some commenters believe we should require winning bidders to expressly elect one of the two amnesty options proposed in the *218-219 MHz Flex NPRM* and that any failure to make an election should result in the automatic application of the original five-year payment schedule.[179] We will not adopt this measure because of its disproportionate financial effect. Eligible Licensees failing to make a specific election of any of the options by the specified Election Date will be placed automatically in the amnesty category. We delegate to the Bureau the authority to implement this *Report and Order*, including creating election procedures.

D. Previous Provisions for Designated Entities

55. *Background*: When the auction for what is now the 218-219 MHz Service was conducted on July 28 and 29, 1994, Part 95 of the Commission's rules included provisions to encourage participation by minority- and women-owned entities and small businesses.[180] Small businesses were

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[176] *C Block Second Report and Order*, 12 FCC Rcd at 16466.

[177] 47 C.F.R. § 1.2109(a).

[178] As explained in note 155, "Election Date" means the last day of the third month following the month on which this *Report and Order* appears in the *Federal Register*. The Bureau will provide more information concerning filing procedures in a subsequent public notice.

[179] ITV Comments at 6.

[180] 47 C.F.R. § 95.816(d).

entitled to pay eighty percent of their winning bids in installments.[181] Businesses owned by minorities and/or women were entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market. Bidders that were both small businesses and minority- and/or women-owned entities could use installment financing as well as bidding credits.[182]

56. On August 2, 1994, the Commission announced the winning bidders in the IVDS auction, which included the recipients of bidding credits.[183] Graceba Total Communications, Inc. ("Graceba"), a winning bidder on two markets, did not qualify for a bidding credit.[184] On August 26, 1994, Graceba filed a petition for reconsideration ("Procedural Petition") of the *Bid Amount Public Notice*. Graceba argued that the auction had been conducted so as to artificially inflate prices.[185] In February 1995, prior to acting on the Procedural Petition, the Commission granted Graceba's licenses for the two markets in which it was the winning bidder. Subsequently, but while Graceba's petition was still pending, the U.S. Supreme Court decided *Adarand Constructors v. Peña ("Adarand")*,[186] holding that racial classifications are unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."[187] Included in this category of classifications subject to "strict scrutiny" are those that are a part of federal programs aimed at providing remedies for race discrimination.[188] On July 11, 1995, Graceba filed an "Emergency Petition For Relief and Request for Expedited Consideration" ("Graceba Emergency Petition") challenging the constitutionality of the bidding credits on the basis of the *Adarand* case. Graceba requested a twenty-five percent reduction in its total bid

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[181] This financing option was spread over a five-year term, with interest set at a fixed rate equal to that in effect for five-year U.S. Treasury notes on the day of issuance of a license. *See Competitive Bidding Fourth Report and Order*. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390-91, ¶ 239.

[182] *See Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2338-89, ¶¶ 46-47.

[183] *See* "Announcement of Bid Amounts," *Public Notice* - Mimeo No. 44160 (rel. August 2, 1994) (*Bid Amount Public Notice*).

[184] The licenses acquired were for markets 283A (Panama City, FL) and 246A (Dothan, AL).

[185] *See* Procedural Petition at 1-2.

[186] 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed.2d 158 (1995).

[187] *Id.* at 227, 115 S. Ct. at 2113.

[188] By adopting a strict scrutiny standard for race classifications, *Adarand* partially overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) ("*Metro Broadcasting*"), in which "intermediate scrutiny" had been applied by the Court in upholding the Commission's use of minority preferences in broadcasting.

amount, to place it on a par with those minority and women bidders that had received twenty-five percent bidding credits.[189]

57. In December 1995, the Commission denied both of Graceba's petitions, along with those filed by other bidders in the 1994 auction seeking similar relief.[190] The Commission denied the Graceba Emergency Petition on the grounds that it constituted an untimely filed petition for reconsideration.[191] Upon appeal by Graceba, the D.C. Circuit upheld the denial of Graceba's Procedural Petition, but remanded the constitutional issues contained in the Graceba Emergency Petition to the Commission for further consideration.[192] On April 30, 1998, after the remand, Graceba filed with the Commission a "Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration" ("Remand Petition").[193]

58. In the course of Graceba's appeal, Community and the Coalition filed a petition to intervene in support of Graceba's constitutional arguments. However, since Community and certain members of the Coalition then had a "petition for relief" pending before the Commission raising identical issues, the Court dismissed the intervention petition.[194] The Bureau subsequently dismissed Community's petition, stating that petitioners should have objected to the payment conditions related

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[189] *See* Graceba Emergency Petition at 14. In its Procedural Petition, Graceba had asked for a 40 percent reduction to the amount of its bid.

[190] *See* In the Matter of Interactive Video and Data Service (IVDS) Licenses, *Order*, 11 FCC Rcd 1282 (1995).

[191] *Id.*, 11 FCC Rcd at 1285.

[192] *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997). In *Graceba*, the Court remanded for further consideration the constitutional challenge to the race- and gender-based bidding credits used in the 1994 auction. Though not a commenter in this proceeding, Graceba raised issues in the Remand Proceeding that are similar to those asserted here by Community.

[193] Concurrently, Graceba filed a "Motion for Leave to File Supplement to Emergency Petition for Relief and Request for Expedited Consideration," which we grant.

[194] *Graceba*, 115 F.3d at 1040 ("Because Community Teleplay and members of the Coalition have a petition still pending before the Commission raising an identical claim, however, they must await the conclusion of those proceedings before bringing their claims here"). Community requests that winning bids be reduced by 25 percent and that 25 percent of down payments be directly refunded. Community argues that any evidence of racial or gender discrimination is societal and that it does not originate with the Commission. They state that the bidding credits were not narrowly tailored, as required by *Adarand*. *See* Community Petition for Relief filed December 5, 1995 ("Community Petition").

to their licenses when they had first been issued in January and February 1995.[195] These petitioners then filed with the Commission an Application for Review, which is pending.[196]

59. *Discussion:* Although the Commission did not seek comment on the constitutional issues raised by Graceba and Community in their respective filings, several commenters make arguments in this proceeding related to those issues. Community and CRSPI ask that the Commission retroactively award discounts equivalent to the twenty-five percent bidding credit to entities not previously eligible to receive them in the IVDS auction.[197] Community cites *Adarand* and the decision of the D.C. Circuit in *Graceba* and requests that the Commission resolve the Community Application for Review prior to adoption of any new rules for the 218-219 MHz Service.[198] EON supports resolution of the Community Application for Review, either prior to, or contemporaneously with, this proceeding. We agree that the issues in the two separate filings are closely related. Accordingly, this *Report and Order* addresses the Graceba Emergency Petition, Remand Petition, the pending Community Application for Review, and the comments and reply comments that raise similar constitutional issues in this rulemaking.

60. Both Graceba and Community argue that the Commission has made no findings with respect to specific instances of past discrimination that might justify the use of gender- and race-based classifications.[199] The Commission previously focused on the constitutional ramifications of *Adarand*

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[195] *See* In Re Community Teleplay, Inc., *et al.* Petition For Relief of Application of Bidding Credits in the Interactive Video and Data Service, *Order*, DA 98-1008, (rel. May 28, 1998).

[196] Application for Review of Community, filed June 29, 1998 ("Community Application for Review").

[197] EON supports the comments of CRSPI and Community and requests that the Commission grant a 25 percent refund or credit, at the licensee's option, to "all non-preferred class auction winners, not just those represented in Graceba's case." *See* EON Reply Comments at 3. The Coalition similarly asks for a retroactive refund or credit for bidders not receiving race- or gender-based bidding credits in 1994. *See* Coalition Reply Comments at 15-16, n.14.

[198] Petitioners maintain that concurrent resolution of the Community Application for Review and this rulemaking proceeding is necessary to forestall the need to again restructure installment payments at a later date. *See* Community Comments at 15. *See also* CRSPI Comments at 8. Further, Community maintains that failure to provide the relief it is requesting here and in the Community Application for Review will perpetuate what it maintains is "an unlawful taking" by the Commission. Community Comments at 14. *See also* Community Application for Review at 13-17. While we agree that a consolidated resolution of the related matter is advisable to address the payment reamortization issues, we see no merit in Community's "taking" argument, which likens the high bids voluntarily made in the auction to mandatory administrative assessments. *Id.* at 15-16. This argument fails to acknowledge the fundamental distinction between the exactment by a government agency of mandatory fees and the voluntary placing of an auction bid based entirely on a bidder's own evaluation of the fair market value of the licenses being auctioned.

[199] *See* Graceba Emergency Petition at 4.

in the course of auctioning C block spectrum in the Personal Communications Service.[200] There, bidding credits similar to the ones used in the auction of what is now the 218-219 MHz Service had been adopted. Like the bidding credits presently under consideration, the C block bidding credits were adopted using the *Metro Broadcasting* intermediate scrutiny standard formulated prior to *Adarand*. In the *Competitive Bidding Sixth Report and Order*, the Commission acknowledged its concern that the record developed there would not adequately support the race- and gender-based provisions of the C block competitive bidding rules under a strict scrutiny standard.[201] To avoid the delay in the auction process that developing such a record would likely entail, coupled with the delay that the Commission anticipated would occur due to legal challenges to these provisions, the Commission decided to eliminate the race- and gender-based provisions for the C block auction and instead employ similar provisions for small businesses.[202] Subsequently, in order to determine whether adequate evidence exists to support such provisions, the Commission's Office of Communications Business Opportunities ("OCBO") commenced a series of studies to examine the minority and female ownership of telecommunications and electronic mass media facilities in the United States ("OCBO Studies").[203] Until completion of the OCBO Studies, it is premature to formulate even tentative conclusions as to the sufficiency of the ownership data being compiled to justify provisions for minority- and women-owned entities. However, while we continue to compile a record looking toward constitutionally appropriate means to encourage minority and female participation in telecommunications ownership, we will provide a remedy responsive to commenters and the issues raised in the Graceba Emergency Petition and the Remand Petition, as well as the Community Application for Review. We will eliminate from our rules the minority- and women-owned business bidding credits and will simultaneously grant credits of commensurate size to all winning small business bidders in the first IVDS auction.

61. To implement this decision, we will apply a twenty-five percent bidding credit ("Remedial Bidding Credit") to the accounts of every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction.[204] The Remedial Bidding

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[200] See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd 136 (1995); *Erratum*, 11 FCC Rcd 5433 (1995) (*Competitive Bidding Sixth Report and Order*).

[201] *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 143.

[202] *See id.*

[203] Studies currently underway include demographic reviews of the sale and transfer of wireless facilities and broadcast stations.

[204] Under 47 C.F.R. § 1.2110 (b)(1) (1994), a small business was an entity that "has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years." More recently, the Commission eliminated consideration of net worth and annual profits in favor of a gross revenue test and adopted a two-tiered small business definition. Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-83 (1996) ("*Tenth Report and Order*"). For future

Credit will be applied prior to computation of the reamortization or payment resumption features described in paras. 40-45. No action on the part of minority- and women-owned winning bidders will be required to implement this remedy. We note that there is no known negative impact on minority- and women-owned bidders because all such bidders also met the small business qualifications and are therefore not disadvantaged by our action. Small business winning bidders that did *not* utilize the installment payment option in the auction shall also be eligible to receive the Remedial Bidding Credit, and they will receive a refund of any resulting excess payment.

62. We believe that in this case the conversion of race- and gender-based bidding credits to small business bidding credits resolves the issues presented by Graceba. Regardless of race or gender, all small business winning bidders were eligible to pay for their licenses in installment payments in what is now the 218-219 MHz Service, so there is no need to invoke the strict scrutiny standard of *Adarand*. Thus, we believe it is appropriate to extend the further benefit of a bidding credit based solely on size.[205] These remedies are consistent with the approach to bidding credits taken in other post-*Adarand* auctions.[206]

63. In devising this remedy, we remain mindful of the need to avoid any major disruptions to the operations of existing 218-219 MHz Service providers and the public. We believe this remedy strikes a proper balance among all factors bearing our consideration, including the importance of finality as a principle in the granting of licenses, fairness to auction participants whose views are not represented in petitions or comments, and the good-faith reliance the Commission placed on then-valid U.S. Supreme Court precedent[207] and the *1993 Budget Act*[208] in adopting the minority and female

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auctions, a small business is an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. 47 C.F.R. § 95.816 (d)(4)(i) and (ii).

[205] We note that our records reflect that the replacement of minority credits with small business credits will not result in the increase of any auction winner's debt.

[206] *See, e.g.*, 47 C.F.R. § 90.910 (800 MHz Specialized Mobile Radio); 47 C.F.R. § 90.810 (900 MHz Specialized Mobile Radio); 47 C.F.R. § 90.1017 (Phase II 220 MHz Service); 47 C.F.R. § 90.1103 (Location and Monitoring Service); 47 C.F.R. § 80.1252 (VHF Public Coast Service); 47 C.F.R. §§ 24.712, 24.717 (C, D, E and F Broadband PCS); 47 C.F.R. § 101.1107 (Local Multipoint Distribution Service); 47 C.F.R. § 27.209 (WCS).

[207] *See supra.*, note 188.

[208] In the *1993 Budget Act*, Congress enjoined the Commission to ensure that businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services, and, in this regard, directed us to consider the use of, among other things, bidding credits.

bidding credits.[209] We reject the remedial options suggested by commenters such as the "condemnation" of licenses and the conducting of auctions *de novo* as disruptive and unsuitable alternatives,[210] given these other significant concerns. The relief we provide today is reasonably constructed to avoid major disruptions to the affected service.[211]

64. In light of our disposition of this case, we are dismissing the Community Application for Review as moot. To the extent Graceba has requested in its Remand Petition that the Commission alter rules and auction results in radio services for which Graceba is not licensed and has no interest, we find that Graceba lacks standing, and we deny such request. In addition, addressing rules relating to other radio services is beyond the scope of this proceeding.

E. Service and Construction Requirements

65. *Background.* In the *218-219 MHz Flex NPRM*, we noted our commitment to eliminate possible barriers that would impede the maximization of efficient and effective spectrum use, and thus determined that strict construction requirements are not the most effective means to promote flexible uses of this spectrum.[212] Hence, we proposed to change the construction requirements in the 218-219 MHz Service to make these requirements consistent with those presently used in other services.[213] Specifically, we proposed to eliminate the three- and five-year construction benchmarks which are currently provided in our rules, and instead require licensees to provide "substantial service" to their areas within five years of license grant.[214]

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[209] After the auction and the *Adarand* decision, the U.S. Supreme Court decided *VMI*. 518 U.S. at 515, 116 S. Ct. at 2264, 135 L. Ed. 2d at 735. Based on *VMI*, we concluded that the gender-based bidding credits used in the 1994 auction of what is now the 218-219 MHz Service are required to meet an intermediate scrutiny standard. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19976 (1996) (*Competitive Bidding Tenth Report and Order*). Accordingly, upon completion of the OCBO Study, we will measure the sufficiency of the evidence of minority and female ownership against the *Adarand* and *VMI* standards, respectively. In this regard, Graceba posits that strict scrutiny of gender-based bidding credits is required. *See* Graceba Emergency Petition at 8. However, the precedent cited by Graceba predates *VMI*.

[210] Boston/Houston suggests that the Congress or the Commission consider condemning or revoking the licenses in the 218-219 MHz Service band to compensate license holders for the investments they have made. *See* Boston/Houston Reply Comments at 6.

[211] *See National Fuel Gas Supply v. FERC*, 313 U.S. App. D.C. 293, 59 F.3d 1281 (D.C. Cir. 1995).

[212] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088.

[213] *See LMDS Second Report and Order*, 12 FCC Rcd at 12659-12661; *WCS Report and Order*, 12 FCC Rcd at 10841-10844.

[214] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088-89.

66. In an effort to reduce the number of speculative application filings and the potential for spectrum warehousing, the Commission promulgated construction benchmarks in its original rules for the 218-219 MHz Service that required the deployment of service within five years of a license grant.[215] Specifically, licensees were required to construct a sufficient number of stations to cover ten percent of the population or land area within one year, thirty percent within three years, and fifty percent within five years.[216] Additionally, they were required to submit a status report on the construction of a system at the end of each benchmark.[217] Under our rules, a licensee who fails to satisfy the benchmark automatically loses its authorization.[218]

67. In 1996, the Commission eliminated the one-year construction benchmark. The Commission concluded that this benchmark was not necessary to prevent spectrum warehousing because the introduction of auctions discouraged this practice.[219] Further, the Commission indicated that removing this benchmark would promote greater flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations related to the construction of their systems.[220] The Bureau later waived the three-year construction benchmark for all licenses in the 218-219 MHz Service determining that enforcing the benchmark while this policy was under review would be unreasonable and contrary to the public interest.[221] Recently, the Bureau waived the five-year construction benchmark for all 218-219 MHz Service licenses with five-year construction benchmark deadlines ending on March 28, 1999, as well.[222] The Bureau again noted that the rules affecting the buildout criteria may ultimately change as a result of the instant rulemaking proceeding and, therefore,

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[215] *Id.*; *see also* 47 C.F.R. § 95.833.

[216] 47 C.F.R. § 95.833(a).

[217] 47 C.F.R. § 95.833(b).

[218] 47 C.F.R. § 95.833(a). Each 218-219 MHz Service system licensee must make the service available to at least 30 percent of the population or land area within the service area within three years of grant of the 218-219 MHz Service system license, and 50 percent of the population or land area within five years of grant of the 218-219 MHz Service system license. Failure to do so will cancel the 218-219 MHz system license automatically. For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

[219] *One-Year Construction Report and Order*, 11 FCC Rcd at 2473. The one-year construction benchmark was waived for 17 of the 18 licensees that received their licenses as a result of the September 1993 lottery.

[220] *Id.*

[221] Requests by Interactive Video and Data Service Auction winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998); Requests by Interactive Video and Data Service Lottery winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB 1997).

[222] *See Five-Year Benchmark Waiver Order.*

concluded that waiving this benchmark requirement would be reasonable, would promote efficient use of the spectrum, and would be in the public interest.[223]

68. *Discussion.* Most commenters support our proposal to eliminate the three- and five-year construction benchmarks and replace them with a "substantial service" construction requirement.[224] Specifically, 218-219 MHz Licensees, In-Sync and Hughes indicate that the current benchmarks are unnecessary and may result in artificial buildout, forcing licensees to spend money on equipment that may not meet the needs of its systems to comply with administrative deadlines.[225] Thus, the commenters favor a more flexible approach to construction benchmarks, urging the Commission to avoid rules that encourage artificial buildout requirements.[226] We agree with the commenters that eliminating the three- and five-year construction benchmarks for all 218-219 MHz licensees serves the public interest, and thus replace it with a "substantial service" analysis.

69. We believe that a "substantial service" analysis would be the best method to encourage the construction of facilities in unserved markets. In the *218-219 MHz Flex NPRM*, we solicited comment on a definition for "substantial service," as well as "safe harbor" examples of substantial service showings.[227] In-Sync suggests that we define "substantial service" to include services provided to businesses or industries that indirectly provide service to the public.[228] Furthermore, In-Sync requests a definition broad enough to include consumer services as well.[229]

70. Upon reviewing the record, we conclude that the public interest would be best served if we define "substantial service" as a "service that is sound, favorable, and substantially above a level of

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[223] *Id.*

[224] ITV Comments at 10-11; 218-219 MHz Licensees Comments at 11-12 and Reply Comments at 9; Hughes Comments at 6 and 7; In-Sync Comments at 10 and Reply Comments at 7; ISTA Reply Comments at 19; EON Reply Comments at 1. We acknowledge that some commenters requested clarification of what satisfied the construction benchmarks with regard to types of transmissions and in terms of construction. Given the outcome of this proceeding, we conclude that it is not necessary to address these issues, in the context of the benchmarks pursuant to the five-year license term, as they are now irrelevant. We will instead lend guidance to licensees as to what will satisfy the construction benchmarks pursuant to the ten-year license term.

[225] 218-219 MHz Licensees Comments at 9; In-Sync Comments at 10; Hughes Comments at 6.

[226] CRSPI Comments at 6; Boston/Houston Comments at 11.

[227] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088-89.

[228] In-Sync Comments at 10.

[229] *Id.*

mediocre service which might minimally warrant renewal."[230] Additionally, to facilitate licensees in their efforts to comply with this standard, we will consider the following "safe harbor" examples in determining whether a 218-219 MHz Service licensee has provided substantial service: (a) a demonstration of coverage to twenty percent of the population or land area of the licensed service area; or (b) a demonstration of specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers; or (c) a demonstration of service to niche markets or a focus on serving populations outside of areas currently serviced by other licensees. We have taken this approach in the past with respect to other services.[231] Furthermore, we believe that these examples are reasonable and will offer the flexibility licensees need to develop and provide service to various populations that are currently unserved. We recognize that this list of examples is not exhaustive. Hence, we will review the record of the licensee in its entirety and will assess each case individually at renewal.

71. Earlier in this *Report and Order*, we determined that amending our rules to allow a ten-year license term for the 218-219 MHz Service would best serve the public interest by ensuring regulatory parity among the licensees.[232] In the *218-219 MHz Flex NPRM*, we, under a ten-year scenario, proposed to require that all 218-219 MHz Service providers either make service available to at least twenty percent of the population or land area, or demonstrate substantial service, within ten

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[230] *LMDS Second Report and Order*, 12 FCC Rcd at 12660; *WCS Report and Order*, 12 FCC Rcd at 10843-10844; In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, WT Docket 96-18, FCC 99-98 (1999); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18621-18625 (1997); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11015-11021 (1997); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool and Implementation of Sections 3(n) and 322 of the Communications Act, *Third Order on Reconsideration*, 11 FCC Rcd 1170-1171 (1995).

[231] *See LMDS Second Report and Order*, 12 FCC Rcd at 12660; *WCS Report and Order*, 12 FCC Rcd at 10844; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool - Implementation of Section 309(j) of the Communications Act, GN Docket No. 93-252, *Third Order on Reconsideration*, 11 FCC Rcd 1170 (1995); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool – Implementation of Section 309(j) of the Communications Act – Competitive Bidding and Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 95-159, 10 FCC Rcd 6884, 6887 (1995).

[232] *See supra*, para. 31.

years of license grant.[233] Alternatively, we asked whether, in lieu of establishing benchmarks, we should require licensees to provide substantial service to their service area within ten years of the license grant as a condition of renewal. Furthermore, we sought comment on whether to require incumbent licensees to comply with a five-year substantial service benchmark five years from the effective date of rules promulgated pursuant to this instant proceeding and the ten-year requirement at the end of their ten-year license term.

72. We received mixed responses to these proposals. The majority of commenters suggest that we conduct our "substantial service" assessment at the end of the license term as a condition of renewal, as this period will provide a complete record for Commission review.[234] ITV indicates that the public interest is not served by having two construction deadlines falling within a short period of time, and therefore the public interest would be best served with one assessment at the time of license renewal.[235] Hughes disagrees with our proposal that a twenty percent coverage of land area or population should be imposed.[236] Hughes urges the adoption of a single "substantial service" standard.[237] ISTA, on the other hand, states that either standard – "substantial service" or twenty percent coverage – is adequate to motivate development of the service.[238]

73. Both Community and EON request that we retain the five-year construction benchmark for lottery winners in the top nine markets, favoring extension on a case-by-case basis.[239] Community states that lottery-won licenses should be extended for five years only after construction benchmarks have been met.[240] According to Community, auction-won licenses should be extended upon following clear "safe harbor" provisions that define "substantial progress" for auction licensees.[241] Community proposes that we require auction winners to reach the "substantial service" benchmark at year six of

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[233] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19089.

[234] ITV Comments at 10-11; In-Sync Comments at 10; 218-219 MHz Licensees Reply Comments at 11. It should be noted that although the 218-219 MHz Licensees favored a "substantial service" five-year construction benchmark in its original comments, its reply comments supported a "substantial service" assessment at license renewal.

[235] ITV Comments at 10-11.

[236] Hughes Comments at 6 and 7.

[237] *Id.*

[238] ISTA Reply Comments at 6.

[239] Community Comments at 8 and Reply Comments at 2; EON Comments at 1.

[240] Community Comments at 10.

[241] *Id.* at 10-11.

the extension.[242] EON disagreed with our proposal to extend the buildout or service requirement to ten years for lottery-won licenses because the extension may slow development since the return on investment is not an incentive for fast development for lottery-won licenses as in the case of auction-won licenses.[243]

74. We disagree with the approaches suggested by Community and EON. Retaining two separate requirements for lottery-won licensees and auction-won licensees does not facilitate our efforts to streamline the service rules and ensure regulatory parity among all of the 218-219 MHz licensees.[244] One commenter, who owns both lottery- and auction-won licenses, notes that it makes no sense to require buildout for the lottery market at an earlier time than the auctioned market.[245] We agree. Although we have expressed concern about system development among lottery winners in the past, we believe that they will have incentives, reasonably similar to those of auction winners, to utilize this spectrum efficiently to maximize the economic opportunities that their licenses create.[246] Moreover, we are confident that both types of licenses – lottery winners and auction winners – will be able to build systems and provide competitive services, given the increased flexibility provided by the rules in this *Report and Order*.

75. Section 309(j)(4)(B) of the Communications Act mandates that we promote investment in and rapid development of new technologies and service by means of performance requirements, such as deadlines and penalties for performance failures.[247] We believe that the approach we are adopting today better achieves this mandate than the buildout requirement that had been in place until now. Given that five years has already passed and the three- and five-year benchmarks were suspended, a single benchmark requirement of substantial service at renewal is warranted. Furthermore, we will require licensees to file supporting documentation showing compliance with the construction requirements at the time of renewal. Failure to demonstrate that "substantial service" is being provided will result in a license not being renewed. We believe that these requirements will offer maximum flexibility, providing a more realistic opportunity for current and future 218-219 MHz licensees to meet their construction obligations and provide high quality wireless services to the public.

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[242] *Id.* at 11.

[243] EON Comments at 1.

[244] *See* Fresno Mobile Radio, Inc. v. Federal Communications Commission, 165 F.3d 965 (D.C. Cir. 1999) (*Fresno*). The Court remanded the case to the Commission because two different standards for buildout were required for auction license winners and incumbents (non-auction winners).

[245] Hughes Reply Comments at 5-6.

[246] *See Fresno*, 165 F.3d at 969. The Court deemed "foolish," the notion that incumbents (non-auction license winners) have less incentive than auction license winners to quickly utilize the spectrum.

[247] 47 U.S.C. § 309(j)(4)(B) (1999).

F. License Transferability

76. *Background.* In September 1993, eighteen licenses were awarded by lottery. As a strategy to reduce license "trafficking" and the filing of speculative applications, the Commission prohibited the transfer of a 218-219 MHz license until the system's five-year construction benchmark (fifty percent coverage) had been met.[248] This prohibition does not, however, apply to 218-219 MHz Service licenses that were acquired through the competitive bidding process.[249]

77. In the *218-219 MHz Flex NPRM*, we sought comment on whether we should retain the license transfer restriction for lottery-won licenses.[250] In the event we retain the license transfer restriction, we sought comment on the manner in which the restriction should be applied in light of the proposed service rule changes involving the construction benchmarks and the partitioning and disaggregation of 218-219 MHz Service licenses.[251]

78. *Discussion.* Most commenters support a total elimination of the license transfer restriction imposed on lottery-won licenses.[252] In-Sync states that this elimination will increase ownership flexibility.[253] Furthermore, the 218-219 MHz Group and Bay Area indicate that the license transfer restriction is based on obsolete "anti-trafficking" concerns and that lifting the restriction will ensure regulatory parity among all 218-219 MHz eligible licensees.[254]

79. Community urges that we retain our current restriction against license transferability because such rules discourage speculative sales of licenses and encourage system construction buildout.[255] Community also states that lottery licensees that do not wish to construct a 218-219 MHz

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[248] 47 C.F.R. § 95.819(b).

[249] *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2335, 2343; *see also* 47 C.F.R. § 95.819(a) (noting that transferability of auction won licenses is governed by Section 1.2111 of the Commission's rules).

[250] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19090.

[251] *Id.*

[252] ITV Comments at 13; 218-219 MHz Licensees Comments at 12 and Reply Comments at 10 n.32; Bay Area at 4; Hughes Comments at 7 and Reply Comments at 7; In-Sync at 11; EON Reply Comments at 2; ISTA Reply Comments at 7-8.

[253] In-Sync Comments at 11.

[254] 218-219 MHz Licensees Comments at 12; Bay Area Comments at 4.

[255] Community Comments at 11 and Reply Comments at 4.

system, should return the license to the Commission to be re-issued by way of competitive bidding as opposed to private sale.[256]

80. The Commission's initial concerns for imposing the license transfer restriction (*i.e.*, "trafficking") are no longer relevant. Previously, we were concerned that licensees would acquire licenses for the sole purpose of reselling them to reap a profit, with no intention of building systems to provide service to the public. In light of this concern, we placed limitations on the ability to transfer lottery-won licenses in order to discourage the filing of speculative applications.[257] However, in 1997, Congress passed the Omnibus Budget Reconciliation Act which eliminated our authority to award licenses by lottery in this context.[258] Because there will be no future lotteries, relaxing the license transfer restriction rule in this instance will not have the result of creating an incentive to acquire licenses with the intention of quickly reselling them for a profit, and applicants will less likely enter into these proceedings for this purpose. License transfer restrictions are no longer essential vehicles to dissuade this practice. We also note that in recent services we generally have not utilized "anti-trafficking" rules.[259]

81. Furthermore, the problems that have plagued the 218-219 MHz Service warrant the removal of obstacles that would thwart the development of this service. Specifically, we recognize that nine of the largest markets were acquired by lottery and have experienced difficulty deploying service in this spectrum. Hence, concerns with the possibility of "trafficking" are now outweighed by our present concern to adopt rules that encourage the utilization of this spectrum. We believe that applying the license transfer restriction in this instance would have an adverse effect on the deployment of service and that relaxing the restriction would be in the public interest as this would place licenses in the possession of those licensees with the incentive and the resources to develop the service in these markets. We, therefore, disagree with Community's assessment concerning the necessity of "anti-trafficking" rules for this service[260] and support the relaxation of this restriction where license transfers for lottery-won licenses will be individually examined to determine whether the license transfer is appropriate under our general public interest standards.

82. Other commenters suggest that we attach "conditions" on the elimination of the transfer restriction. For instance, ISTA states that we should eliminate the transfer restriction once the five-

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256 *Id.*

257 *See 1992 Allocation Report and Order* at 1641; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6222-6224 (1991).

258 *See* 47 U.S.C. § 309(i)(5) (1999).

259 *See, i.e., LMDS Second Report and Order*, 12 FCC Rcd 12545; *39 GHz Report and Order and Second NPRM*, 12 FCC Rcd 18600.

260 CTI Reply Comments at 4.

year construction benchmark is met.[261] Applying this option is impractical because we no longer require licensees to meet a five-year construction benchmark.[262] EON suggests that we create an initial window for license transfers that, upon expiration, requires buildout or meeting the service benchmark before a license transfer is allowed.[263] Although this is a potentially viable option because it creates a degree of flexibility for license transfers, we believe that a more liberal approach would best promote the utilization of the 218-219 MHz spectrum.

83. In this *Report and Order*, we are reassessing our current rules for the 218-219 MHz Service and removing potential barriers to maximize the development of viable services in this spectrum. As such, the relaxation of the license transfer restriction for the eighteen lottery-won licenses will promote this objective. However, we note that we will evaluate all license transfer applications on a case-by-case basis pursuant to Section 1.948 of our rules to determine whether the license transfer would be in the public interest.[264]

G. Spectrum Aggregation

84. *Background.* In establishing rules for the 218-219 MHz band, we concluded that the best way to promote competition in the developing marketplace would be to make at least two facilities available in each market.[265] Therefore, our cross-ownership rule prohibits an entity from holding or having an interest in the licenses for both frequency segment A (218.0-218.5 MHz) and frequency segment B (218.5-219 MHz) in the same service area.[266]

85. *Discussion.* Petitioners sought elimination of the cross-ownership rule, stating, *inter alia*, that competing services with larger bandwidth and greater capitalization provide the necessary competition to alleviate any concern that a 218-219 MHz Service licensee would exert monopoly power by aggregating one megahertz of spectrum, and that a full one megahertz of spectrum would enhance spectrum flexibility through expanded applications and services.[267] In 1996, the Commission denied a request for rulemaking on this issue.[268] In deciding not to grant the petition for rulemaking, we concluded that since the *interactive television marketplace* is in a relatively early state of

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[261] ISTA Comments at 19.

[262] *See Five-Year Benchmark Waiver Order.*

[263] EON Comments at 1.

[264] *See* 47 C.F.R. § 1.948.

[265] *Allocation Notice*, 6 FCC Rcd at 1371.

[266] 47 C.F.R. § 95.813(b)(1).

[267] Letter Amendment at 4-5; *accord* MKS Petition at 5.

[268] *Competitive Bidding Sixth MO&O/Further Notice*, 11 FCC Rcd at 19363.

competition," allowing a single entity to acquire both licenses in a service area would limit the opportunity for other potential competitors to emerge.[269] However, it is now clear that restricting the competitive analysis of the 218-219 MHz band to the interactive television service is inconsistent with failure of that service to develop in the marketplace and with the myriad services that are being proposed and that our rules now permit in the 218-219 MHz Service.[270] Therefore, it is now appropriate to reexamine the cross-ownership prohibition.

86. While most of the comments on this issue are in favor of permitting cross-ownership. EON and Community oppose permitting aggregation of those licenses. They argue that such an approach would create the possibility for a single licensee in a specific market, with a potential monopolistic effect on 218-219 MHz suppliers of equipment and applications.[271] This potential will then effectively create a disincentive for suppliers to invest in product development and place control of market entry in the hands of one entity.[272]

87. Ten parties take an opposing view and favor permitting the aggregation of 218-219 MHz service licenses.[273] In-Sync, ISTA, IVDS Enterprises Joint Venture (IVDS Enterprises), Interactive Innovations, Inc. (Interactive), Hispania & Associates, Inc. (Hispania), Eagle Interactive Partner, Inc. (Eagle), and the Coalition support permitting a licensee to hold both the "A" and "B" licenses in the same market. The primary reason cited by the parties for such a change is that a licensee with a 500 kHz bandwidth cannot be a serious competitor to operations in different bands that have larger available bandwidths. Dispatch also supports our proposal because licensees will face competition from other service providers which in turn will eliminate any anticompetitive concerns.[274] Concepts supports cross-ownership because the Commission has opened up various bands to competing services in the past and should do so in this case as well.[275] IVDS/RLV, L.L.C. and Friends of IVDS, Inc. (IVDS/RLV) also is in favor of cross-ownership between the A- and B-band licenses because it allows flexibility, thereby enhancing the interference elimination techniques.[276]

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269 *Id.* (emphasis added).

270 *See 218-219 MHz Flex MO&O*, 13 FCC Rcd at 19075, ¶ 16, 19091, ¶ 49.

271 EON Comments at 1; Community Reply Comments at 9.

272 *Id.*

273 These commenters are the 218-219 Group, Bay Area, Dispatch, In-Sync, ISTA, IVDS Enterprises, Interactive, Hispania, Eagle, and Coalition.

274 Dispatch Comments at 4.

275 Concepts Comments at 5.

276 IVDS/RLV Comments at 3.

88. The evolution of services in the 218-219 MHz Service has made our cross-ownership restrictions a bar to investment in product development and creation of new services. Economies of scale and the types of service utilized in this band suggest that more bandwidth would be optimum for the development of 218-219 MHz operations. We agree with the majority of commenters that bandwidth greater than 500 kHz is necessary to compete effectively with operations in different bands offering similar services. Thus, we believe that permitting spectrum aggregation in the 218-219 MHz Service will promote, not inhibit, competition.

89. In the *218-219 MHz Flex NPRM*, we also sought comment on whether the 218-219 MHz Service spectrum should be included in any overall spectrum caps. While Hughes agrees with our proposal because aggregation may actually lead to development of new services and increased demand for products, it asserts that the 218-219 MHz Service spectrum should be included in any overall spectrum caps that are generally imposed on CMRS licenses.[277] The decisional factor in whether to apply a spectrum cap to a particular service is a balancing of the potential benefits and costs. We believe that the benefits normally associated with the spectrum cap are insufficient at this time to impose the spectrum cap on the 218-219 MHz Service.

90. The CMRS spectrum cap was imposed out of concern that "excessive aggregation [of spectrum] by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."[278] It is intended to promote a vigorous competitive market for the provision of commercial mobile radio services, to ensure that each mobile service provider has the opportunity to obtain sufficient spectrum to compete effectively, and to ensure that no single provider is able to preclude the provision of service by effective competitors or significantly reduce the number of competitors by aggregating spectrum.[279]

91. It is possible that CMRS licensees may be the most efficient users of the 218-219 MHz spectrum because of their existing base station infrastructures. For example, it may be that a current CMRS licensee would be able to use its existing infrastructure to provide services in the most cost efficient manner. There may be other economies of scope in the provision of different services as well. Applying the CMRS spectrum cap to the 218-219 MHz spectrum would interfere with the realization of these savings by preventing the direct participation by those entities who own the existing CMRS infrastructure and, consequently, prevent customers from benefitting from these savings, with little off-setting benefit in competition.

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[277] Hughes Comments at 7.

[278] *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8101 (1994).

[279] *See CMRS Third Report and Order* at 8108.

H. Partitioning and Disaggregation

92. In the *Partitioning Report and Order*, we expanded our rules to permit geographic partitioning and spectrum disaggregation for broadband PCS licensees.[280] Since the adoption of partitioning and disaggregation rules for broadband PCS, we have adopted and proposed adopting partitioning and disaggregation for a number of services.[281] Consistent with the broadband PCS rules, we proposed to permit partitioning and disaggregation for the 218-219 MHz Service.

93. We now conclude that a flexible approach to partitioned areas, similar to the approach we adopted for broadband PCS, is appropriate for the 218-219 MHz Service. We will therefore permit partitioning of 218-219 MHz Service licenses based on any area defined by the parties within the licensee's service area.[282] We conclude that combined partitioning and disaggregation should also be permitted for the 218-219 MHz Service. This approach would afford parties optimal flexibility to respond to market forces and demands for service relevant to their particular locations and service offerings. We authorize a partitionee and disaggregatee to hold its license for the remainder of the original licensee's term. We believe that this approach would prevent licensees from using partitioning and disaggregation to circumvent our established license term rules. Additionally, by limiting the license term of the partitionee or disaggregatee, we ensure that there will be maximum incentive for parties to pursue available spectrum as quickly as practicable, thus expediting the delivery of service to the public.

94. In the *Partitioning Report and Order*, we concluded that allowing partitioning and disaggregation would help to (a) remove potential barriers to entry, thereby increasing competition; (b) encourage parties to use spectrum more efficiently; and (c) speed service to unserved and underserved

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[280] Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996) (*Partitioning Report and Order*). Partitioning is the assignment of geographic portions of the license along geopolitical or other boundaries. Disaggregation is the assignment of discrete portions or blocks of spectrum licensed to a geographic licensee or qualifying entity. *Id.* at 21833, n.2.

[281] *See, e.g.*, Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Fourth Report and Order*, 12 FCC Rcd 13453 (1997); Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, *Fourth Report and Order*, 13 FCC Rcd 11655 (1998).

[282] In the *218-219 MHz Flex NPRM*, we proposed partitioning rules which permitted licensees to utilize FCC-recognized service areas when defining a partitioned service area, and defined "FCC-recognized service areas" to include Major Trading Areas (MTAs) and Basic Trading Areas (BTAs). Rand McNally, copyright owner of the MTA and BTA classifications, asserts that the Commission must not use the MTA/BTA classifications for partitioning within the 218-219 MHz Service without first negotiating a specific licensing agreement. Rand McNally Comments at 2.

areas.[283] Similarly, we believe that such an approach for the 218-219 MHz Service would result in the same public interest benefits. Providing licensees with the flexibility to partition potentially creates smaller service areas that could be licensed to small businesses, including those entities that previously may not have had the resources to participate successfully in spectrum auctions. With regard to the copyright concerns Rand McNally has raised, we will revise our final rules to remove the reference to MTAs or BTAs as potential geographic areas to be used for partitioning in the 218-219 MHz service. Rather, we will provide a specific reference to the United States Department of Commerce Bureau of Economic Analysis Economic Areas and EA-like areas which the Commission has defined in other contexts.[284] We believe that this approach resolves the copyright concerns raised by Rand McNally.[285] We further note that our substitution of EA-like areas for MTAs and BTAs does not limit the ability of licensees to partition a license to their desired degree of specificity (including by the submission of exact coordinates, if they choose), but is designed solely to address the copyright concerns raised by Rand McNally.

I. Technical Standards

95. *Background.* Having concluded that we will be able to meet our goal of providing licensees the flexibility to design their service offerings in response to market demand, we now turn to the specific technical restrictions associated with the service. In the *218-219 MHz Flex NPRM*, we invited comment on our technical rules, including those rules requiring automatic power control capability,[286] antenna height and transmitter power limitations,[287] duty cycle limitations,[288] and other interference protection standards. We also asked whether the interference provisions of Section 95.861

[283] *Partitioning Report and Order*, 11 FCC Rcd at 21843.

[284] *See, e.g.*, 47 C.F.R. § 90.823.

[285] *See* Rand McNally comments at 2.

[286] 47 C.F.R. § 95.855(a). Automatic power control capability, included in the RTU circuitry, automatically adjusts the RTU power output to the minimum amount necessary for communication between the CTS and the RTU. This capability minimizes the possibility of an RTU causing interference to a television broadcast receiver. We implemented the automatic power control requirement for all RTUs in the *1992 Allocation Report and Order*, 7 FCC Rcd at 1635, 1648.

[287] 47 C.F.R. §§ 95.855, 95.859.

[288] 47 C.F.R. § 95.863. A transmitter "duty cycle" is a limit to the amount of time a transmitter can transmit during a specific time frame, which, in the 218-219 MHz Service as initially allocated, minimizes the potential for interference to reception of TV Channel 13.

of our rules,[289] which require 218-219 MHz Service licensees to resolve problems with interference to television broadcast reception or discontinue operation, are sufficient to protect broadcast spectrum.[290]

96. We established the technical restrictions on the 218-219 MHz Service in the *1992 Allocation Report and Order*. TV Answer and the Association for Maximum Service Television had previously reached an agreement whereby then-IVDS licensees and TV Channel 13 operations could co-exist.[291] Both this agreement and our interference restrictions were based on TV Answer's system design.[292] However, the potential applications for the 218-219 MHz Service go far beyond the service envisioned by TV Answer when these rules were designed. Concurrent with the expansion of potential applications for the service, we have received various requests for waiver of these technical standards,[293] as well as petitions that we relax or eliminate certain technical rules.[294]

97. *Discussion.* Commenters overwhelmingly claim that our current rules no longer serve the 218-219 MHz Service, and that by retaining the rules, we will significantly hinder the flexibility we are seeking to provide licensees of the service.[295] As EON notes, the spectrum is being used for

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[289] 47 C.F.R. § 95.861.

[290] *218-219 MHz Flex NPRM*, 13 FCC Rcd 19092. The applicable rule is at 47 C.F.R § 95.861.

[291] *1992 Allocation Report and Order*, 7 FCC Rcd at 1632.

[292] *Id.*, 7 FCC Rcd at 1633.

[293] *See* Jay M. Lieberman and Michael R. Walton, dba J & M Partnership Request for Waiver (July 14, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a)); Ronald E. Dowdy Request for Waiver (July 9, 1997) (seeking the same); Raveesh K. Kumra Request for Waiver (Apr. 17, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a), and the duty cycle limitations, 47 C.F.R. § 95.863(a)). These waiver requests were incorporated into the record of this proceeding by the *218-219 MHz Flex NPRM*. *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094, n.201.

[294] These requests include petitions seeking waiver of automatic power control in RTUs with power in excess of 100 milliwatts, 47 C.F.R. § 95.855(a). *See* Third Letter Amendment (attachment at 2). *Cf.* Phoenix Data Communication, Inc., Request for Waiver of Section 95.855 of the Commission's Rules, *Order*, 13 FCC Rcd 25195 (WTB, 1998) (*Phoenix Waiver*) (discussing waiver of the RTU automatic power control requirement, filed in conjunction with an application for type acceptance of its proposed equipment); Requests for Waiver of Section 95.859(a)(2), Concerning Interactive Video and Data Service (IVDS) Transmitter Power Limits, *Order*, 11 FCC Rcd 4669 (WTB 1996) (*1996 Waiver Order*) (discussing waiver of 47 C.F.R. § 95.859(a)(2) to permit use of specific CTS technology programmed to transmit only during the TV Channel 13 horizontal blanking interval).

[295] *See, e.g.*, ITV Comments at 14.

purposes other than those for which the original restrictions were created.[296] In their discussion of specific technical rules, commenters claim that the current restrictions discourage manufacturers from developing equipment for the service.[297] Many commenters also claim that 218-219 MHz Service licensees would be able to better develop services if greater parity existed between services.[298] In addition, Concepts also claims that the current technical rules contain several inconsistencies.[299]

98. There is broad agreement that the current technical rules can be relaxed without increasing the possibility of interference. ISTA notes that by separating the 218-219 MHz Service transmitter and the television receiver, potential interference can be eliminated, and IVDS cited tests by Young Design and Berkeley Varitronic Systems, Inc., that concluded that the interference potential is virtually eliminated if the transmitter is separated from television sets by a distance of fifty feet or more.[300] Several commenters also agree with our tentative conclusions that the evolution toward precise digital technology, both within the evolving 218-219 MHz Service industry,[301] and on the part of the broadcast industry,[302] will further reduce interference potential.[303] ISTA, for example, suggests that the evolution toward digital will enable all spectrum technologies to monitor and control their respective spectrums and suppress interference.[304] Finally, commenters note that we allow other services to operate in frequencies adjacent to the television spectrum without the same types of technical

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[296] EON Reply Comments at 2; *See also* Petty Comments at 1 (noting that most services now contemplated for the 218-219 MHz Service involve applications not associated with television); 218-219 Group Comments at 15 and In-Sync Comments at 14 (noting that because it is unlikely that set-top boxes that could interfere with TV Channel 13 reception due to their proximity to television sets will be used – as proposed in TV Answer's service model – our power control rule will be unnecessary in many cases).

[297] *See, e.g.,* Phoenix Reply Comments at 2; Boston/Houston Comments at 10; 218-219 Group Comments at 15 (discussing automatic power control); ISTA Comments at 14; IVDS Enterprises Comments at 1.

[298] ISTA Comments at 18; 218-219 Group Comments at 18.

[299] Concepts Comments at 3-4.

[300] ISTA Comments at 5-6; IVDS Enterprises Comments at 1.

[301] For example, current licensees of 218-219 MHz Service systems have indicated in presentations to Bureau staff that the marketable uses of systems in the band appear to use digital emission types of equipment, utilizing much lower transmitter power than is presently authorized, and that digital emissions produce imperceptible (or no) interference to TV Channel 13 when the RTU transmitting antenna is at least three feet away from the TV receiver.

[302] *See generally, e.g.*, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809 (1997).

[303] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094-95. *See also id*, 13 FCC Rcd at 19078 (denying petitions to expand the area of RTU duty cycle limits); *Mobility Report and Order*, 11 FCC Rcd at 6611.

[304] ISTA Comments at 20. *See also* 218-219 Group Comments at 17; Hughes Comments at 9.

restrictions we impose on 218-219 MHz Service operations and that, because these other adjacent-band services are able to operate without causing interference, the technical restrictions on the 218-219 MHz Service are not justified.[305] Several commenters contrast the minimal technical restrictions for the Automated Maritime Telecommunications Systems (AMTS) – which operates in the band immediately adjacent to TV Channel 13 – with the more stringent technical restrictions for the 218-219 MHz Service, which is separated from Channel 13 by 2 MHz.[306] Other commenters point to similar situations in the amateur services and Private Land Mobile Radio Services in the 220-222 MHz band.[307]

99. We conclude that, in general, our specific technical rules are designed for a service model that bears little similarity to the breadth of services envisioned for the 218-219 MHz Service, and that these rules provide a measure of interference protection that may not be necessary in all cases.[308] However, we also believe that we should retain any technical rule that still provides needed interference protection to TV Channel 13 regardless of the specific service being employed by a 218-219 MHz Service licensee. We briefly re-examine each technical rule, and retain those that are still broadly applicable to the 218-219 MHz Service.

1. Duty Cycle Limitations

100. *Background.* Section 95.863 of our rules[309] imposes a maximum duty cycle of five seconds per hour for each RTU, whether fixed or mobile. In the *218-219 MHz Flex NPRM*, we noted that the duty cycle limitation – which applies only to those RTUs operating within the TV Channel 13 predicted Grade B contour – was not designed as "one of the principal ways we intended to minimize

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[305] *See, e.g.*, Hughes Comments at 9; CRSPI Comments at 3-4; IVDS/RLV Comments at 3; In-Sync Comments at 14; Boston/Houston Comments at 8-9. *See also 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19093-94 (noting that other services are authorized to transmit in frequencies adjacent to or nearby 218-219 MHz with higher power levels than allowed at 218-219 MHz and with no duty cycle restrictions).

[306] Community Reply Comments at 5, Hughes Comments at 9. AMTS is authorized for 80 channels from 216.0125 MHz to 229.9875 MHz. 47 C.F.R § 80.385. Several commenters make an additional argument that the 2 MHz "guard" band between TV Channel 13 and the 218-219 MHz Service provides interference protection that makes our technical rules unnecessary. Boston/Houston Comments at 10 and CRSPI Comments at 5-6.

[307] Hughes Comments at 9, IVDS Enterprises Comments at 2.

[308] Although MKS suggests that, even with a total relaxation of the rules, many licensees may still consider the 218-219 MHz Service a "non-starter," this restriction cannot serve as a basis for the FCC to fail to maintain technical rules that are necessary to provide adequate interference protection. MKS Comments, ¶ 9. *See also* EON Reply Comments at 2 (suggesting that anything short of completely lifting the technical standards would appease only a minority of the commenters and be detrimental to the industry's future).

[309] 47 C.F.R. § 95.863.

the interference potential of the 218-219 MHz Service," but was instead designed as "an additional safeguard against interference."[310]

101. *Discussion.* Commenters suggest that new uses of the 218-219 MHz Service in conjunction with "substantial improvements in television receiver technology," make the rule unnecessary.[311] Concepts says that allowing the transmitter to only transmit during the blanking intervals will produce signals that are neither visible nor audible to the viewer without the use of the prescribed duty cycles,[312] and other commenters who suggest that we retain a duty cycle limitation in some form see little need for duty cycles for mobile units or those RTUs that operate far away from the television set-top.[313] We conclude that because licensees may design their system to operate in a cycle that will not cause television interference, or they may operate equipment that is sufficiently removed from television receivers to prevent interference, the duty cycle rule no longer has broad applicability and we eliminate it.

2. 100 Milliwatt Power Limitation on Mobile RTUs

102. *Background.* In authorizing mobile RTU operations in the *Mobility Report and Order*, we established a 100 milliwatt mean power limit for mobile RTUs.[314] We concluded that it was appropriate to establish a lower limit than the twenty watts allowed for fixed RTUs and CTSs, because allowing unrestricted mobile operations increases the interference potential with respect to the operations of licensees of other services.[315]

103. *Discussion.* There is support for relaxing the 100 milliwatt limit. For example, Dispatch – whose parent company also owns and operates a Channel 13 TV station – contends that the 100 milliwatt limit can be increased without causing interference to Channel 13 operations.[316] Community, citing a study conducted by the Technology Applications Center of Norfolk and the

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[310] *218-219 MHz Flex MO&O*, 13 FCC Rcd at 19077 (citing *Mobility Report and Order*, 11 FCC Rcd at 6618-19).

[311] IVDS Enterprises Comments at 1-2.

[312] Concepts Comments at 2. Several commenters discussed the use of systems designed to transmit only during the vertical blanking interval of the television wavecast. For example, RTT suggests that such a system would substantially increase data transmission throughput versus the current duty cycle limitation. RTT Comments at 6.

[313] Community Comments at 17; Community Reply Comments at 5; Dispatch Comments at 6.

[314] *Mobility Report and Order*, 11 FCC Rcd at 6617.

[315] *Id.*

[316] Dispatch Comments at 6. Dispatch's parent company owns WTHR(TV) Channel 13 in Indianapolis. Dispatch Comments at 1, n.1.

Engineering Department of Old Dominion University (TAC/ODU) that found no significant interference by one-watt mobile RTUs operating with no duty cycle outside a residence in the Grade B contour of Channel 13, suggests that mobile RTUs should be allowed to operate anywhere outside a residence at one watt, and that we should grant waivers to allow operation at higher powers upon a technical showing of no interference.[317] Commenters suggest other limits, including four watts, based on the experiences with low-band FM and TV Channel 6;[318] twenty-five watts and an ERP not exceeding eighteen watts, based on our AMTS rules;[319] and an average power limit at 100 milliwatt or the peak power at twenty watts, whichever is lower.[320] Based on the comments, we conclude that a power limit for mobile RTU operation is still justified to protect against TV Channel 13 interference, but that the studies show that we can relax the 100 milliwatt limitation. We will set the maximum average mobile RTU power at four watts. Although Community's study was based on comprehensive interference predictions but actual tests at one watt, we conclude that a four-watt limit is desirable, given the absolute interference protection provisions and our desire to allow maximum flexibility in the 218-219 MHz Service. However, because mobile RTU use has the potential to cause sporadic interference that may be difficult to trace and resolve – for example, when an RTU-equipped vehicle drives by a household with a TV Channel 13 receiver[321] – we find the four-watt mobile RTU limit as suggested by commenters to be justified, and within the range of power limits the Commission has established for services operating in or in close proximity of the 218-219 MHz band. We emphasize that, in no case, may a 218-219 MHz Service licensee cause interference to TV Channel 13 reception (see § 95.861, 47 C.F.R. § 95.861), and we expect that technical limitations will require licensees, in some applications, to use RTUs that use a lower power than authorized by our rules.

3. Automatic Power Control

104. *Background.* Section 95.855(a) of our rules requires the use of automatic power control for any RTU with power in excess of 100 milliwatts in order to ensure that the RTU uses the minimum effective radiated power necessary for successful communications.[322] As part of our *218-219 MHz Flex Order and NPRM*, and in response to waiver requests pertaining to automatic power control, we re-evaluated whether this rule, designed to mitigate potential interference, is still justified.

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[317] Community Comments at 17.

[318] CRSPI Comments at 5. *See also* ISTA Comments at 7 (finding a 4 watt limit "justified").

[319] Community Reply Comments at 5 (citing 47 C.F.R. § 80.215(i)).

[320] RTT Comments at 6.

[321] *See* Community Comments at App. A (suggesting that the fact that a vehicle-mounted RTU that causes interference will quickly move away as a basis for concluding that the potential for interference is limited).

[322] 47 C.F.R. § 95.855.

105. *Discussion.* Many commenters note that we have previously granted waivers of the automatic power control restrictions.[323] For example, we waived the RTU automatic power control requirement in conjunction with an application for type acceptance of equipment proposed by Phoenix Data Communications, Inc.[324] In its petition, Phoenix sought a waiver for a transmitter that was part of a microprocessor-controlled street light photocontroller that uses the 218-219 MHz Service radio frequencies to report the status of a street light to a base radio receiver system.[325] We found that the configuration of the 218-219 MHz system as described by Phoenix differed to such an extent from the systems for which the service was originally designed that there was no possibility that the Phoenix equipment would be in close proximity to television receivers such that there was an increased potential for interference to TV Channel 13 reception.[326] Based on our findings in the Phoenix Waiver, we cannot agree with Dispatch that the automatic power control represents a minimal intrusion on system design.[327] Rather, we conclude that it represents an example of an unnecessary regulatory impediment to the development of applications for the 218-219 MHz Service. We conclude that the automatic power control restriction will not be applicable to all services envisioned in the 218-219 MHz Service, and we eliminate it. As discussed further in Section IV.I.6, *infra*, 218-219 MHz Service licensees remain under the continuing obligation to resolve any interference problems with television broadcast reception or discontinue operations.

4. CTS Antenna Height and Transmitter Power Ratios

106. *Background.* Section 98.859(a) of our Rules sets maximum power limits for CTSs, based on the height of the CTS antenna. The taller the CTS antenna, the less powerful the maximum ERP we permit for the CTS.

107. *Discussion.* The 218-219 MHz Group suggested that we could either allow operations at up to 250 watts ERP as long as the power of the signal remains substantially lower than the Channel 13 signal or, alternately, that we could adopt a standard "colocation exemption" within one-quarter of one mile of a Channel 13 broadcaster.[328] RTT suggests that we allow full-power CTS transmissions in the TV Channel 13 blanking interval as an alternative to the existing height and power limitation ratios,[329] and Concepts supports full-power operations at 500 feet height above average terrain in all

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[323] *See, e.g.,* 218-219 Group Comments at 15.

[324] *Phoenix Waiver*, 13 FCC Rcd 25195.

[325] Phoenix Data Communication, Inc., Request for of Section 95.855 of the Commission's Rules, at 3.

[326] *Phoenix Waiver*, ¶ 6.

[327] Dispatch Comments at 7.

[328] 218-219 Group Comments at 17.

[329] RTT Comments at 6.

cases if signals are only transmitted during the blanking intervals of TV Channel 13.[330] We have previously waived Section 98.859(a)(2) of our Rules for a 218-219 MHz Service system employing vertical blanking technology, after finding that the "new and innovative technology" being used was unlikely to cause interference.[331] Given the variety of mechanisms licensees have proffered for the elimination of possible interference, we conclude that the current height-power ratios are no longer broadly applicable, and we remove them. We will retain the general restriction in Section 95.859(a) of our Rules that no CTS antenna shall be elevated higher than necessary to assure adequate service.

5. Limits on Transmitter Effective Radiated Power

108. *Background.* In the *Mobility Report and Order* we considered – but rejected – any modifications to the 20-watt maximum power for fixed RTUs after concluding that no party had offered any evidence to show that our choice of a twenty-watt limit for fixed service was ill-advised.[332] Under the provisions in Section 95.855(b) of our Rules, a CTS is required to operate between a one- and twenty-watt ERP, based on its CTS location within a TV Channel 13 service area. We re-examine our maximum twenty-watt rule today.

109. *Discussion.* Concepts suggests that the power limitations should be modified to allow for full twenty-watt ERP in all cases if signals are only transmitted during the blanking interval of TV Channel 13.[333] Several other commenters suggest the elimination of this rule on the basis that higher power limits would allow licensees to use new modulation techniques which would reduce the cost of building systems.[334] Although we want to promote flexibility in the provision of 218-219 MHz Services, we do not believe that a reduction in build-out costs, by itself, can serve as a basis for eliminating the rule. Based on Concept's comments, however, we are convinced that licensees may be able to develop systems that account for the additional potential for interference in the Grade B area that prompted our reduced maximum CTS ERP in Section 95.855(b) of our rules, and we establish a maximum CTS ERP of twenty watts in all cases. This additional flexibility should foster the development of new services in the 218-219 MHz Service.

110. Nevertheless, we conclude that we should retain a twenty-watt maximum ERP because the establishment of a maximum permissible power limit provides an important measure of interference protection and no commenter (except those advocating the complete removal of the technical rules) offered evidence that our specification of a maximum power level for the 218-219 MHz Service is ill-advised. The twenty-watt limit is appropriate because the 218-219 MHz Service is

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[330] Concepts Comments at 6.

[331] *1996 Waiver Order*, 11 FCC Rcd at 4670.

[332] *Mobility Report and Order*, 13 FCC Rcd at 6617.

[333] Concepts Comments at 6.

[334] ISTA Comments at 5 (promoting the use of QAM-64 Modulation); IVDS Enterprises Comments at 2 (suggesting a 25 watt power limit).

allocated such that there will be other 218-219 MHz Service operations in adjacent MSAs and RSAs to which a 218-219 Mhz Service licensee must provide interference protection. Moreover, unlike automated marine telecommunications system (AMTS) services (in which subsequently authorized TV services do not enjoy interference protection), 218-219 MHz Service licensees have an absolute duty to provide interference protection to TV Channel 13 reception, regardless of when the TV service was authorized. As a general matter, we do not believe that 218-219 MHz Service licensees will propose operations in excess of twenty watts, nor will they be able to afford adequate interference protection for operations greater than twenty watts. In this connection, we note that the pending waiver requests of Jay M. Liberman and Michael R. Walton, dba J&M Partnership, Ronald E. Dowdy, and Raveesh K. Kumra, all involve proposed operations at twenty watts. In the unusual circumstance in which a 218-219 MHz Service provider structures a system that can operate in excess of twenty watts and provide necessary interference protection, we believe that a request for a waiver would be the most appropriate course.

6. General Interference Protection

111. *Background.* We also asked whether the general interference protection afforded by Section 95.861 of our Rules[335] is sufficient to protect broadcast reception.[336] Section 95.861 of our Rules requires, *inter alia*, that 218-219 MHz Service licensees either resolve interference problems to television broadcast reception or discontinue operations.[337] Commenters were divided on whether we should rely on Section 95.861 of our Rules as the sole means of interference protection. Eagle asserts that we should completely remove the technical and operational rules, and instead retain Section 95.861 of our Rules to resolve interference problems to broadcast operations,[338] and In-Sync claims that Section 95.861(e) of our Rules – which requires 218-219 MHz Service licensees to investigate and resolve interference upon written complaint by either a television viewer or broadcast station – provides adequate interference protection by itself.[339] However, other commenters state that the complete removal of technical and operational limitations will result in interference, and thus Section 95.861 of our Rules, on its own, provides inadequate protection.[340]

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[335] 47 C.F.R. § 95.861.

[336] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094-95.

[337] Portions of the interference rule requiring a 218-219 MHz Service licensee operating within a TV Channel 13 station Grade B predicted contour to notify households of the potential for interference are subject to petitions on file with the Commission. *See* Third Letter Amendment (attachment 2-3) (seeking clarification that the notification requirements of Section 95.861(c) would not apply to licensees providing one-way emergency transmission to receive-only CTSs); *accord* MKS Petition at 5 (requesting elimination of the notification procedures).

[338] Eagle Reply Comments at 2.

[339] In-Sync Comments at 14.

[340] *See, e.g.*, Hispania Reply Comments at 2.

112. *Discussion.* As an initial matter, we agree with commenters that Section 95.861(e) should be the foundation for resolving interference complaints between 218-219 MHz Service licensees and television stations and viewers.[341] Given the nature of the 218-219 MHz Service, this section provides the most suitable mechanism for resolving interference complaints. The alternative – primary reliance on more specific technical rules – would either undermine this service's flexibility (which we have determined is critical to its success), or lead to frequent waiver requests by those proposing new and innovating uses of the spectrum (an impractical result that would turn the waiver process on its head).[342] Primary reliance on Section 95.861(e) will not, of course, eliminate in advance all potential interference concerns between 218-219 MHz systems and TV Channel 13 reception,[343] but this approach toward interference management will avoid imposing restrictions that may be overprotective or unnecessary in many cases. Concepts, Hispania, and Interactive all state that licensees will most likely have to make trade-offs between specific technical considerations – such as power, antenna height, duty cycle, timing with respect to Channel 13 vertical blanking intervals, distance to an over-the-air TV receiver, and automatic power controls – in order to provide adequate interference protection, and we agree this may the be the case for certain 218-219 MHz Service systems.[344] Such tradeoffs go hand-in-hand with the flexibility we are providing, but we must leave it to the 218-219 MHz Service licensee to determine what tradeoffs will be necessary for a particular system to avoid Section 95.851's ultimate resolution of an interference problem that cannot be corrected by the system – discontinuance of 218-219 MHz Service operations.[345]

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[341] 218-219 Group Reply Comments at 7. *See also* ISTA Comments at 14 (also suggesting modifications to the language of this subsection). We also note that § 95.861(a) provides a mechanism for the resolution of interference problems among 218-219 MHz Service licensees.

[342] We previously relied on this approach when the 218-219 MHz Service was designed for a specific application. *See 1992 Allocation Order*, 7 FCC Rcd 1634, ¶ 31 (stating that we would accept requests for waivers of our antenna height limit on a case-by-case basis). *C.f. 1996 Waiver Order*, 11 FCC Rcd at 4670, ¶ 6.

[343] For example, some licensees may choose to develop service based on the model originally envisioned in the *1992 Allocation Order*, and may use a set-top RTU that has the potential for Channel 13 interference. *See also, e.g.,* Community reply comments at 6 (concluding that automatic power control should be retained for certain fixed RTUs and for mobile units); RTT Comments at 7 (suggesting that automatic power control may still be necessary for mobile applications utilizing greater power).

[344] Hispania Reply Comments at 1-2; Interactive Reply Comments at 2; Concepts Supplemental Filing at 5 (noting that the current technical standards rules are "overprotective if applied simultaneously").

[345] Because of the flexibility of services a 218-219 MHz Service licensee may provide, we will not adopt the additional technical rule modifications suggested by commenters in order to allow a licensee to determine what technical tradeoffs are necessary for a particular system. *See, e.g.,* ISTA Comments at 9 (suggesting that a definition of "other than fixed" for mobile RTUs, would allow us to restrict "other than fixed" RTUs to commercial, industrial, or vehicular applications that cannot be used around a household and thus wouldn't cause potential Channel 13 interference); Concepts Comments at 2 and 5 (asking us to specify "a residential dwelling which uses direct reception of TV Channel 13 signals," in order to limit requests to mitigate TV interference to only those viewers using direct reception of TV signals); Dispatch Comments at 6-7 (calling for additional considerations with respect to fixed facilities).

113. Concepts notes that after-the-fact resolutions are more expensive than prior planning to avoid interference,[346] and we agree that 218-219 MHz Service licensees who rely solely on the interference correction provisions of Section 95.861(e) of our Rules could cause interference with TV Channel 13 reception that might not be resolved for as long as thirty days. Accordingly, we find merit in Concept's suggestion that licensees should, as part of their planning process, produce an interference control plan detailing the technical parameters and operational information being used to mitigate any identified interference effects.[347] We will therefore retain and expand the requirement in Section 95.815 (d)(3) of our Rules that licensees prepare and submit an interference plan.[348] We clarify that the plan must provide an analysis of a licensee's proposed system and describe the methods being used to eliminate co- and adjacent channel interference. Moreover, the 218-219 MHz Service licensee must update the plan to reflect changes to its system design or construction.

114. More extensive use of the pre-planning requirement can largely replace Section 95.861(c) of our Rules, which requires 218-219 MHz Service licensees to provide notification to households within a TV Channel 13 station Grade B predicted contour of the potential for interference, unless a licensee obtains written consent from the TV Channel 13 station licensee to dispense with the notification. Because we expect 218-219 MHz Service licensees to utilize pre-planning to identify and mitigate any potential interference, the household notification rule is needlessly burdensome. We retain both the requirement in Section 95.861(d) of our Rules that each 218-219 MHz Service licensee must, upon request, install free of charge an interference reduction device to any household that experiences interference, and the absolute interference protection provision of Section 95.861(e) of our Rules. We will also require that the 218-219 MHz Service licensee provide a copy of the interference control plan (and all subsequent modifications) to all TV Channel 13 station licensees whose predicted Grade B contour overlaps with the 218-219 MHz Service licensee's service area.

115. Finally, we recognize that many television viewers will not know that any incremental interference can be eliminated under the rules.[349] However, both the initial design for the 218-219 MHz Service and comments received in this proceeding lead to the conclusion that a particularly strong interference potential exists when 218-219 MHz Service equipment is placed near television receivers. In those cases, it is reasonable to conclude that the 218-219 MHz Service use and the TV Channel 13 viewing will occur in the same household. In the *1992 Allocation Order*, we noted that a 218-219 MHz Service subscriber might experience some interference to its television reception when operating an RTU, but we did not impose additional notification provisions.[350] Instead, we noted that "it might behoove the [218-219 MHz Service] licensee to install an interference reduction device on

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[346] Concepts Reply Comments at 1-2.

[347] Concepts Reply Comments at 2.

[348] 47 C.F.R. § 95.815 (d)(3).

[349] Dispatch Comments at 7-8.

[350] *1992 Allocation Order*, 7 FCC Rcd at 1637, ¶ 49.

the television receivers of its subscribers," and concluded that "[i]t will be at the subscriber's discretion as to whether sporadic interference to his own household television reception that might be caused by RTU operation is unacceptable."[351] This analysis is still valid, and we conclude that 218-219 MHz Service licensees who design systems that include RTUs designed for household use will choose to account for any potential interference in order to ensure consumer acceptance of their equipment.

J. Incorporation by Reference of Part 1 Standardized Auction Rules

116. *Background.* In the *Part 1 Third Report and Order*, we amended our uniform set of competitive bidding rules for all auctionable services, which applied generally to the 218-219 MHz Service, incorporating our experience to date and allowing us to conduct future auctions in a more consistent, efficient, and effective manner.[352] These amended procedures, set forth in Part 1, Subpart Q of the Commission's rules, supersede previously adopted service-specific rules, unless the Commission determines that with regard to particular matters, the retention or adoption of service-specific rules is warranted.[353]

117. In the *218-219 MHz Flex NPRM*, we proposed to conduct all future auctions for licenses in the 218-219 MHz Service in conformity with the amended general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules. Specifically, we proposed to employ the Part 1 rules governing designated entities, application issues, payment issues, competitive bidding design, procedure and timing issues, and anti-collusion.[354] In this regard, consistent with our decision in the *Part 1 Third Report and Order*, we would no longer offer installment payments as a means of financing small business participation in the 218-219 MHz Service auction. Instead, we proposed to retain the two tiers of small business size standards currently set for 218-219 MHz Service licensees, and utilize the standard schedule of bidding credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses, which would allow for somewhat higher bidding credits in light of the suspension of installment payment financing.[355] We sought comment on these proposals and on whether any of our Part 1 rules would be inappropriate in an auction for this service.

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[351] *Id.*

[352] *Part 1 Third Report and Order*, 13 FCC Rcd at 374.

[353] *See id.*, 13 FCC Rcd at 382.

[354] *See 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19095-96.

[355] *Compare Part 1 Third Report and Order*, 13 FCC Rcd at 404 (establishing standard bidding credits of 35 percent for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 25 percent for businesses with average gross revenues not exceeding $15 million for the preceding three years) *with* 47 C.F.R. § 95.816(d)(1) (service-specific bidding credits of 15 percent for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 10 percent for businesses with average gross revenues not exceeding $15 million for the preceding three years).

118. *Discussion.* Commenters support applying the Part 1 rules to the 218-219 MHz Service.[356] We believe that application of these rules will allow 218-219 MHz Service auction participants to realize the benefits enjoyed by participants in other spectrum auctions of a streamlined, efficient licensing process. Therefore, we will adopt our proposal to follow the competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules, to conduct all future auctions for licenses in the 218-219 MHz Service. Specifically, we conclude that the Part 1 rules will govern competitive bidding issues in the 218-219 MHz Service, including issues concerning designated entities, application issues, payment issues, competitive bidding design, procedure and timing issues, and anti-collusion.[357]

119. Accordingly, installment payments will no longer be offered as a means of financing small business winners of licenses in the 218-219 MHz Service auction. We will continue to employ small business size standards and bidding credits to promote designated entity participation in the 218-219 MHz Service.[358] Two commenters support the Commission's application of the small business size standards currently specified for the 218-219 MHz Service,[359] while two other commenters believe that the gross revenue thresholds for determining what constitutes a small business and a very small business should be increased.[360]

120. We believe the current 218-219 MHz Service small business size standards are appropriate for this service. In addition, we have not undertaken any action that would change these capital requirements. Therefore, consistent with our proposals, we will retain the two tiers of small business size standards currently specified for 218-219 MHz Service licensees and will utilize the standard schedule of bidding credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses. Accordingly, we will define a small business as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold

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[356] *See* Hughes Comments at 10; In-Sync Comments at 15; Community Teleplay Comments at 15; ITV Comments at 17; IVDS Affiliates at 17.

[357] *See, e.g.*, 47 C.F.R. §§ 1.2110 (designated entities), 1.2105 (bidding application and collusion), 1.2106 (upfront payments), 1.2103 (competitive bidding design), 1.2104 (competitive bidding mechanisms).

[358] *See* revised 47 C.F.R. § 95.816(c), listed herein under Appendix B. *See also* 47 C.F.R. § 1.2110(e).

[359] Community asserts that the 218-219 MHz Service is a service for small businesses, and therefore, the small business definitions should remain at their low levels to prevent businesses considered too small in a broadband service from taking advantage of bidding credits. Community Comments at 21. In-Sync believes such credits will allow it to devote more capital to market development, thereby expediting service to the public. In-Sync Comments at 16.

[360] *See* ITV Comments at 17-18. ITV maintains that, because of the lack of operating experience in the industry, 218-219 MHz Service licensees will not have access to bank debt or other sources of lending, and therefore, suggests that the thresholds for "very small business" and "small business" be raised to $5 and $18 million dollars, respectively.

interests in such entity and their affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.

121. In-Sync contends that all existing licensees and their affiliates should receive a 15 percent bidding credit on future auctions in light of the controversial history of the IVDS service.[361] In-Sync reasons that any pool of future bidders in the 218-219 MHz Service would be limited to existing licensees and CMRS providers seeking to aggregate spectrum. In-Sync asserts that, since 218-219 MHz Service licensees will be undercapitalized, they will be unable to compete effectively with CMRS aggregators, thereby meriting the extra bidding credit.[362] We do not agree. We believe that our auction and service rules will provide existing licensees with a reasonable opportunity to compete against CMRS aggregators. Accordingly, we will adopt tiered bidding credits for these small business definitions, consistent with levels adopted in the Part 1 proceeding. Small businesses will receive a twenty-five percent bidding credit. Very small businesses will receive a thirty-five percent bidding credit. Bidding credits for small businesses are not cumulative. As noted in the Part 1 proceeding, we believe that this approach will provide adequate opportunities for small businesses of varying sizes to participate in spectrum auctions.[363] We believe that the tiered bidding credits we adopt for the 218-219 MHz Service are reasonable in light of our decision not to use installment payments and expect that they will enable small businesses to compete for spectrum licenses through our auction program.

V. MEMORANDUM OPINION AND ORDER

122. *Introduction.* We have before us a petition for reconsideration of the *Tenth Report and Order*[364] filed by Interactive America Corporation ("IAC").[365] For the reasons discussed below, we dismiss IAC's Petition for Reconsideration.

123. *Background.* IAC was the high bidder on fifteen IVDS licenses in Auction No. 2. IAC, however, failed to make the required initial down payments on the licenses. Instead, IAC requested a waiver, seeking postponement of the initial payment deadline, which the Commission denied.[366]

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[361] In-Sync Comments at 15.

[362] In-Sync Comments at 15-16.

[363] *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

[364] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) ("*Tenth Report and Order*").

[365] IAC Petition for Reconsideration, filed December 27, 1996.

[366] *See* Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384 (Com. Car. Bureau 1994) (request for waiver denied); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 10 FCC Rcd 12153 (1995) (petition for reconsideration denied); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service

Thereafter, IAC sought appellate review of these decisions.[367] On November 23, 1996, the Commission released the *Tenth Report and Order*, which established rules to govern the then-planned second auction of IVDS licenses (Auction No. 13).[368] On December 4, 1996, the Bureau released a public notice announcing Auction No. 13, scheduled to begin February 18, 1997, and listing as available for auction the fifteen licenses on which IAC defaulted.[369] On December 27, 1996, IAC filed a petition for reconsideration of the *Tenth Report and Order*. In its petition, IAC contends that the Commission did not disclose IAC's pending appeal, thereby failing to disclose all material facts about the licenses subject to auction.[370] IAC further contends that the Commission should postpone any IVDS auction until adoption of final rules.[371]

124. *Discussion.* Intervening circumstances have made IAC's Petition for Reconsideration moot. First, on January 29, 1997, the Bureau postponed Auction No. 13 "to give the Commission an opportunity to consider [various] requests of potential bidders and license holders seeking to obtain additional flexibility for the service."[372] In addition, on May 22, 1997, the United States Court of Appeals for the District of Columbia Circuit denied on the merits IAC's petition for review, thereby rendering moot IAC's argument on reconsideration that the Commission should provide full disclosure of pending proceedings that may affect the licenses to be auctioned.[373]

Licenses, *Order*, 11 FCC Rcd 8211 (1996) (application for review denied).

[367] *See Interactive America Corp. v. F.C.C.*, No. 96-1320 (D.C. Cir., filed September 6, 1996), consolidated with *Commercial Realty St. Pete, Inc. v. F.C.C.*, No. 96-1271 (D.C. Cir., filed August 7, 1996).

[368] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) ("*Tenth Report and Order*"). The *Tenth Report and Order* established competitive bidding rules governing the second auction of the Interactive Video and Data Service (Auction No. 13).

[369] *See* "Auction of Interactive Video and Data Service (IVDS) – Auction Notice and Filing Requirements for 981 IVDS Licenses Scheduled for February 18, 1997," *Public Notice*, 11 FCC Rcd 20950 (1996).

[370] IAC Petition for Reconsideration at 2-3.

[371] *Id. at* 3.

[372] "Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses," *Public Notice*, 12 FCC Rcd 1389 (1997).

[373] *See Commercial Realty St. Pete, Inc. v. F.C.C.*, 116 F.3d 941 (D.C. Cir., May 22, 1997) (unpublished opinion available at 1997 WL 358223), *reh'g denied* (D.C. Cir. Aug. 6, 1997), *cert. denied*, 118 S. Ct. 445 (Nov. 17, 1997) *and cert. denied*, 118 S. Ct. 629 (Dec. 15, 1997). We note that in every auction, we caution bidders that the Commission makes no representations or warranties about the use of spectrum for particular purposes and that applicants should perform their own due diligence. *See, e.g.*, "Auction of Local Multipoint Distribution Service; Auction Notice and Filing Requirements for 986 Basic Trading Area ("BTA") Licenses in the 28 GHz and 31 GHz Bands, Scheduled for December 10, 1997," *Public Notice*, 13 FCC Rcd 7754 (1997); *see also* Local Multipoint Distribution Service Bidder Information Package at 94.

125. IAC's argument that the Commission should not hold an auction until final rules are adopted is rendered moot by today's action. Since the filing of IAC's petition, we have undertaken a comprehensive examination and modification of our regulations governing the licensing and use of the 218-219 MHz Service (*see* Section III., *supra*),[374] finalized our service rules,[375] and determined that our Part 1 competitive bidding rules will be applicable to the 218-219 MHz Service (*see* Section IV.H., *supra*). Accordingly, IAC's petition for reconsideration is dismissed.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

126. A Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Final Paperwork Reduction Act of 1995 Analysis

127. This *Report and Order* contains a modified information collection, which has been submitted to the Office of Management and Budget (OMB) for approval. As part of our continuing effort to reduce paperwork burdens, we invite the public and other government agencies to take this opportunity to comment on the information collection contained in this *Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 30 days from publication of this Report and Order in the Federal Register. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. A copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, room 1-C804, 445 12th Street S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov.

C. Further Information

128. For further information concerning this *Report and Order*, contact Jamison Prime, Shellie Blakeney, or Nick Kolovos of the Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at (202) 418-0680 (voice), (202) 418-7233 (TTY); or Robert Allen of the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418-0660 (voice), (202) 418-7233 (TTY).

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[374] *See also 218-219 MHz Flex Order*, 13 FCC Rcd at 19080-96.

[375] *See* Final Rules attached hereto as Appendix B.

VII. ORDERING CLAUSES

129. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 4(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a), that 47 C.F.R Parts 20 and 95 of the Commission's Rules ARE AMENDED as set forth in Appendix B, effective sixty days after publication in the *Federal Register*, following OMB approval, unless a notice is published in the *Federal Register* stating otherwise.

130. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

131. IT IS FURTHER ORDERED that the waiver requests of Jay M. Liberman and Michael R. Walton, dba J&M Partnership, Ronald E. Dowdy, and Raveesh K. Kumra ARE GRANTED insofar as the proposed waivers are consistent with the new rules we adopt herein and ARE DENIED in all other respects.

132. IT IS FURTHER ORDERED that Rulemaking docket number RM-8951, established in response to the Petition for Rulemaking and associated amendments filed by Euphemia Banas, *et al*, IS TERMINATED.

133. IT IS FURTHER ORDERED that the Emergency Motion for Stay of Community Teleplay, Inc. IS DISMISSED as moot.

134. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), 47 C.F.R. § 0.331, and 47 C.F.R. § 0.11(a)(8), the Chief of the Wireless Telecommunications Bureau, and the Managing Director, ARE GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

135. IT IS FURTHER ORDERED that, in light of the remedial action ordered above, the Application for Review of Community Teleplay, Inc., *et al.* IS DISMISSED in part as moot and DENIED in all other respects.

136. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement to Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc. IS GRANTED.

137. IT IS FURTHER ORDERED that the Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc., and the Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc. ARE GRANTED in part to the extent described above and ARE DENIED in all other respects.

138. IT IS FURTHER ORDERED that all pending grace period requests filed by current or former 218-219 MHz Service licensees ARE DISMISSED.

139. IT IS FURTHER ORDERED that the Petition for Reconsideration of Interactive America Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary